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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5435

PAUL KERN IMBLER,

Petitioner,

v.

RICHARD PACHTMAN, District Attorney,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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IN THE

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PAUL KERN IMBLER,

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RICHARD PACHTMAN, District Attorney,

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ON WRIT OF CERTIORARI TO
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BRIEF FOR PETITIONER

To the Honorable Warren E. Burger, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now Petitioner Paul Kern Imbler by his Counsel, Roger S. Hanson, Esq., and presents his Opening Brief in support of reversal of that certain 2-1 decision of the United States Court of Appeals for the Ninth Circuit, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Pages 116 - 125, Appendix).

INTRODUCTION

This case brings before this Honorable Court for the first time the often-litigated, nationally-important issue of the scope of a district attorney's immunity to a Federal Civil Rights suit brought under 42 U.S.C. 1981 - 1986. *Holtan v. Boman*, 493 F.2d 1176, 1177 fn.2 (7th Cir. 1974); *Hampton v. City of Chicago*, 484 F.2d 602, 608 (7th Cir. 1973).

Past history has not favored plaintiffs in 42 U.S.C. 1983 lawsuits brought under the Federal Civil Rights Acts against State District Attorneys. Stemming from decisions of this Honorable Court granting *judicial* immunity, there has been engrafted upon the Federal Civil Rights statutes case made "quasi-judicial" immunity for prosecutors who are acting "within the scope of their prosecutorial function" or who nonetheless act in good faith, making discretional decisions, and as a consequence, inadvertently deprive a plaintiff of Civil Rights.

Nonetheless, several recent cases have tended toward piercing the veil of immunity in the umbrella shrouding the prosecutor who either wilfully deprives a person of rights and immunities guaranteed to him under the Federal Constitution, or who acts outside the scope of the normal prosecutorial function. The consequences of these late decisions are to create a conflict of authority in the Federal Circuits necessitating a definitive decision by this Honorable Court to resolve the discrepancy.

The instant case presents the question of the scope of immunity to be awarded to a Los Angeles County Deputy District Attorney who wilfully and knowingly suffered and used perjured testimony to cause the conviction and sentence to death of Petitioner Paul Kern Imbler in 1961.

Importantly, a Federal Writ of Habeas Corpus was granted in April, 1969 for, inter alia, the same illegal actions of the prosecutor which were the subject matter of the instant suit brought under 42 U.S.C. 1983. *Imbler v. Craven*, 298 F.Supp. 795 (C.D. California, 1969); Appendix, Pages 30 through 60.

Thus, there exists a clear threshold basis for this 42 U.S.C. 1983 suit, satisfying and countermanding one of the oft-quoted reasons for denying such lawsuits, frivolity, and lack of good faith and basis for the suit. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Appendix, Page 119).

While it must be admitted that respondent Pachtman was not a party to the 28 U.S.C. 2254 Writ of Habeas Corpus granted in this case, 298 F.Supp. 795 (C.D. Calif. 1969), (Appendix Pages 30 through 60), it is clear that his employer *was* a party and the factual and legal issues there litigated are difficult for someone in the position of Pachtman to now circumvent.

Thus the litigants to the instant Civil Rights suit do not write on a clean slate, and many of the oft-cited reasons for disallowing 42 U.S.C. 1983 suits against district attorneys vanish here.

Several Federal Circuits have enunciated purported arguments in support of prosecutorial immunity:

(1) the danger of influencing public officials by the threat of a lawsuit;

(2) the deterrent effect of potential liability on men who are considering entering public life;

(3) the drain on the valuable time of the official caused by unsubstantial suits [which would require inordinate private record keeping];

(4) the unfairness of subjecting officials to liability for the acts of their subordinates;

(5) the theory that the official owes a duty to the public and not to the individual;

(6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.[1]

In the case at bar, only the *first* element would appear even possibly remotely appropos of the facts. It may be conceded that certain public officials may be influenced if potential illegitimate claims supported by formal suit awaited in the wings for every perceived transgression of their prosecutorial function, but we here deal with no different a problem than that faced by anyone who is sued spuriously; timely answers, demurrers, and discovery can dredge the unsupported claim to the surface so that it can be dismissed. As to item (2), it hardly appears to be an element of recruiting salesmanship used on new law school graduates to induce them to seek employment in the prosecutor's office, and certainly the bulk of new prosecutors commence their careers upon a foundation other than a belief that as long as they remain on the State's attorneys payroll, they are immune to Civil Rights suit no matter what their future transgressions may be; we are unwilling to accuse the nation's prosecutors of this state of mind. We suggest item (3) is not applicable because of the granting of relief *prior* to suit to this plaintiff under 28 U.S.C. 2254 for, inter alia, the very act which is the subject matter of the instant Civil Rights suit; it cannot be said that the suit is frivolous or is otherwise insubstantial. *Imbler v.*

[1] *Bauers v. Heisel*, 361 F.2d 581, 590 fn. 9 (3rd Cir. 1966 en banc); *Robichaud v. Ronan*, 351 F.2d 533, 535-536 (9th Cir. 1965; 66 Harvard Law Review 1285, 1295, N. 54 (1953); *Madison v. Gerstein*, 440 F.2d 338, 340, N. 5; Note, Civil Rights - Section 1983 - Prosecuting Attorney Held Immune From Civil Liability for Violation of Civil Rights Act, 42 N.Y.U.L. Rev. 160 (1967), *Littleton v. Berbling*, 468 F.2d 389, 412 (7th Cir. 1972).

Craven, 298 F.Supp. 795 (C.D. Calif. 1969). Item (4) is obviously not applicable, because the suit is here brought against the District Attorney who was *personally* responsible for the constitutional deprivation, the defendant Pachtman. We have sued neither his superiors nor his inferiors. Element (5) negates the usually considered role of the prosecutor – the prosecution of the guilty and protection of the innocent, i.e., the attorney for *all* of the people including even the defendant, and the defendant's rights are to be protected. In California, of course, item (6) is not here applicable, for only *the* District Attorney is reachable by the ballot box; an Assistant or Deputy, as is Pachtman, is a mere employee and can not be voted out of office. In spite of the acts established by the opinion granting habeas corpus, 298 F.Supp. 795 (C.D. Calif. 1969), we know of no removal proceedings against respondent Pachtman instituted by the State Bar, the Local Bar Associations, or the office of the Los Angeles County District Attorney. It would appear that no one in official capacity is concerned about the defendant's role of continuing employment as a Deputy Los Angeles County District Attorney. As well, element 6 may avoid *future* illegal deprivations of *future* victims of the aberrant prosecutor, but it provides no relief to his past victims. This petitioner can obtain no remedy for his immense financial loss and emotional drain by a mere removal of defendant Pachtman from the District Attorney's office.

Thus, the significant prayer in a 42 U.S.C. 1983 lawsuit for money damages for the emotional turmoil and drain of some four years spent on Death Row, constantly under the threat of execution by lethal gas, followed by some six additional years confinement under maximum security conditions, presents the only rational solution to the needs of the victim of the instant respondent Pachtman's foul deed.

The issue before this Honorable Court is whether the dismissal, before trial, of the instant Civil Rights suit was proper, where it is alleged that the prosecutor acted in a non-good faith, non-discretional area to knowingly suffer and allow prosecution perjury. To the resolution of that issue we devote this Brief.

The suit upon which relief was sought under 42 U.S.C. 1983 is set forth in the Appendix at Pages 61 through 88, incorporating the decision *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), Appendix Pages 30 through 60 inclusive.

In *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), the 28 U.S.C. 2254 Federal Writ of Habeas Corpus Order and Judgment granting relief to Petitioner Imbler, United States District Judge Warren J. Ferguson found that Respondent District Attorney Pachtman had violated certain trial precepts in at least the following:

1. Having knowledge that a key prosecution witness, Alfred John Costello had suffered at least three convictions of felonies, some of which resulted in Court-ordered confinements to state asylums for the mentally ill, Respondent Pachtman allowed Costello to testify to the jury that he, Costello, had *voluntarily* placed himself in said mental hospitals. While Pachtman was aware of the falseness of this testimony, he allowed it to stand uncorrected, using the rationalization that the jury could "decide" whether the commitment was voluntary or not. (298 F.Supp. 795, 806, Appendix Pages 30 through 60).

2. With knowledge provided by the F.B.I. "make-sheet" on Costello, the prosecutor respondent Pachtman, in seeking to rehabilitate his key witness Costello, led him into a story that was demonstrably false concerning his academic achievement; Costello was allowed to testify that he obtained a four-year degree in Industrial

Relations in two years from the University of California, and a second degree in engineering, a totally different academic subject, in *night school*, from the University of Southern California in 1954, although the prosecutor respondent Pachtman was aware that Costello was confined to San Quentin State Prison from 1951 through November of 1953, and had had a previous history of mental illness. (298 F.Supp. 795, 805, Appendix Pages 30 through 60).

3. With knowledge that Los Angeles Police Officers were then in the very Courtroom that the trial of Petitioner Imbler was taking place, waiting to arrest Costello for "bad check charges," Respondent Prosecutor Pachtman prevailed on them to refrain from arresting until he had finished with Costello, immediately thereafter leading Costello into testimony stating that he, Costello, was "trying to straighten himself out." This was false testimony elicited in an effort to create a false impression of Costello in the mind of the jury trying Petitioner Imbler for first-degree murder. That jury was eventually to vote the death penalty for Imbler. (298 F.Supp. 795, 807, Appendix Pages 30 through 60).

4. The Prosecutor Respondent Pachtman, with full knowledge that Costello had been convicted of at least *three* felonies, permitted Costello to testify that he had only been convicted of one felony. This was a failure to correct known false testimony. (298 F. Supp. 795, 807, Appendix, Pages 30 through 60).

5. Having access to police logs and having the police investigator at his side during trial, Respondent Prosecutor Pachtman knowingly let stand false evidence concerning whether prosecution witnesses Hillen and Costello had seen or had been shown pictures of petitioner Imbler prior to their viewing him in a police line-up. (298 F. Supp. 795, 806,

Appendix Pages 30 through 60). While it is not conclusively shown that Respondent Pachtman had perused the log, it is clear that the police officer investigator wilfully failed to correct the foregoing false evidence and that failure constituted a denial of due process of law to Petitioner Imbler.

6. With full knowledge that in the immediate past Costello had written several non-sufficient fund checks for relatively small amounts, the prosecutor led Costello into the demonstrably false story that he then was employed as an engineer for Carnation Dairies making "$9,000 - $10,000 per year;" in fact, Costello was an itinerant bum essentially without any gainful employment, and this fact was known to the prosecution team because of their intense contact with Costello on the Imbler murder trial. (298 F. Supp. 795, 802, 803, Appendix Pages 30 through 60).

The foregoing constitute the knowing use of false testimony and the failure to correct false testimony when the same was offered during trial, an express violation of the mandates of this Honorable Court in *Napue v. Illinois*, 360 U.S. 264, 269 (1959):

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence . . . " (298 F. Supp. 795, 803, Appendix Pages 30 through 60).

This Honorable Court further utilized and adopted the following language from *People v. Savvides*, 1 N.Y. 2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E. 2d 853, 854 - 855:

> "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth." (298 F. Supp. 795, 803, Appendix, Pages 30 through 60).

Essentially, the Federal District Judge, in dismissing the 42 U.S.C. 1983 suit against Defendant Respondent Pachtman, adopted the rationale that all of the foregoing acts of Pachtman were done in the course of his "traditional role" as a prosecutor, i.e., in the preparation of a witness for trial, the interrogation of that witness, and related areas commonly done by both the honest and dishonest prosecutor. (Appendix, Pages 104 through 113).

It is the position and thesis of this petitioner that the knowing use of perjured testimony by a prosecutor can never be within the scope of the *legitimate* prosecutorial function, and can not qualify for prosecutorial immunity under a 42 U.S.C. 1983 lawsuit. Such can not be the good-faith, discretionary act commonly held to insulate the prosecutor from liability. *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974), the case here under review, split 2 - 1 on this issue.

It is safe to state that the instant case clearly pinpoints the issue for resolution on a national basis.

Other leading circuits have granted plaintiffs the right to bring suit against the prosecutor under quite similar circumstances. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). Appendix A-1, this brief.

It is clear that this Honorable Court, in a host of decisions, has clearly held it to be a Denial of Due Process of Law for a prosecutor to knowingly use

perjured testimony to achieve a criminal conviction. *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed.932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 692 (1967); *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *DeMarco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974); and the cases cited in each opinion.

In view of this overwhelming authority, it is clear that this prosecutor knew, or with any consideration must reasonably have known, that his perpetrations were non-good faith, non-discretionary acts that were absolutely prohibited in any criminal prosecution. Thus, he acted illegally and wilfully and should not be heard to defend by contending that any and all of his acts should be insulated from judicial review in the Federal Court system under 42 U.S.C. 1983. The scope of immunity to be accorded to the nation's errant and aberrant prosecutors is thus to be resolved in this case of national import.

OPINIONS BELOW

There are several opinions below of significance to the development of this case. They are *People v. Imbler*, 57 Cal. 2d 711, 21 Cal. Rptr. 568, 371 P.2d

304 (1962); *In re Imbler*, 60 Cal. 2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963); *In re Imbler*, 61 Cal. 2d 556, 39 Cal. Rptr. 375, 393 P.2d 687 (1964); *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969); *Imbler v. State of California*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104. In addition, of course, is the opinion now sought review before this Honorable Court, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974).

Several of these are contained in the single appendix: *People v. Imbler*, 57 C.2d 711 (Pages 8 through 14); *In re Imbler*, 60 C.2d 554 (Pages 14 through 29); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Pages 30 through 60); *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Pages 116 through 125).

JURISDICTION

The grounds upon which the jurisdiction of this Court is invoked are 28 U.S.C. Section 1254 (1). The other grounds upon which the jurisdiction of this case is invoked are a severe and clear-cut conflict of decisions in the various circuit courts of appeals in the United States. A further ground upon which the jurisdiction of this Honorable Court is invoked is a denial of equal protection of the law and deprivation of rights to bring a lawsuit under 42 U.S.C. 1983 in the courts governed by the United States Ninth Circuit, whereas had petitioner been able to bring his lawsuit in the Fourth, Fifth, Sixth, Seventh, or Eighth Circuit, his cause of action would not have been dismissed under the allegations of the complaint. The jurisdiction is

further invoked under this Court's power to resolve critical issues of national importance.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It involves the grant of the Federal Writ of Habeas Corpus under 28 U.S.C. 2254 which provides:

28 U. S. CODE SEC. 2254

§2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State

corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such a factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determinations, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous. (c) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the

existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding. As amended Nov. 2, 1966, Pub.L. 89-711, § 2, 80 Stat. 1105.

It also involves 42 U.S.C. Section 1981 - 1986, which provides:

TITLE 42

EQUAL RIGHTS UNDER THE LAW

§1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. (RS §1977.)

From Act May 31, 1870, c 14, §16, 16 Stat 144.

TITLE 42

PROPERTY RIGHTS OF CITIZENS

§1982. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit,

purchase, lease, sell, hold and convey real and personal property. (RS §1978.)

From Act Apr. 9, 1866, c 31, §1, 14 Stat 27.

TITLE 42

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

§1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (RS §1979.)

From Act Apr. 20, 1871, c 22, §1, 17 Stat 13.

TITLE 42

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

§1985. First. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while

engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Second. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grant or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to

vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support of advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. §1980.)

From Act July 31, 1861, c 33, 12 Stat 284; April 20, 1871, c 22, §2, 17 Stat 13.

TITLE 42

ACTION FOR NEGLECT TO PREVENT CONSPIRACY

§1986. Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section [§1985 of this title], are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable dilligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect

or refusal may be joined as defendants in the action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued. (RS §1981.)

From Act April 20, 1871, c 22, §6, 17 Stat 15.

ISSUES TO BE RESOLVED AND QUESTIONS PRESENTED

(1) To resolve and define on a national level the recurring issue and problem of the liability of a District Attorney to a lawsuit brought against him under the Federal Civil Rights Act, 42 U.S.C. 1983, and related statutes, an issue never fully considered and adjudicated by this Honorable Court.

(2) To resolve whether the knowing use of perjured testimony by a Deputy District Attorney to obtain a conviction for first degree murder and sentence of death is an act for which that Deputy District Attorney shall receive carte blanche immunity under 42 U.S.C. 1983, disenabling his victim from bringing a Federal Civil Rights Lawsuit for money damages.

(3) To resolve the conflict which now exists in the United States Court of Appeals for several of the federal circuits which have considered the above issue and which have rendered conflicting opinions within the

meaning of Rule 19, Rules of the Supreme Court of the United States.

(4) To decide whether when, as here, a Federal Writ of Habeas Corpus has already been granted in the instant case for the knowing use of perjured testimony on the part of a Los Angeles County Deputy District Attorney by a United States District Judge, and affirmed by the Ninth Circuit, it is appropriate to dismiss before trial, on the filed pleadings, petitioner's lawsuit against the Deputy District Attorney brought under 42 U.S.C. 1983 and related statutes.

(5) To decide whether a Deputy District Attorney, an arm of the *executive branch* of state and county government, shall any longer be accorded any immunity under 42 U.S.C. 1983 following the decision of this Honorable Court in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, 42 U.S.L.W. 4543, April 17, 1974.

(6) To decide whether the knowing use of perjured testimony by a Deputy District Attorney to achieve a conviction for murder in the first degree with a resulting death sentence is an act within the normal prosecutorial function or role of a prosecuting attorney such as to insulate the said district attorney from a Federal Civil Rights lawsuit brought under 42 U.S.C. 1983 and related sections.

(7) To determine whether petitioner Paul Kern Imbler is receiving equal protection of the law in the Federal Ninth Circuit when his suit against a Deputy District Attorney under 42 U.S.C. 1983 is dismissed, whereas had the Deputy District Attorney carried out his dastardly act of knowingly using perjury in another Federal Circuit the said act would provide a basis for cause of action, citing in particular the Sixth Circuit decision *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) allowing said lawsuit; said Sixth Circuit decision, *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) is herewith appended for the convenience of this Honorable Court in support of the assertion that a severe conflict now exists in the Federal Circuits. (Appendix A-1, this brief.)

(8) Whether, if the asserted "immunity" enjoyed by a District Attorney stems from an alleged "quasi-judicial" position occupied by a District Attorney, a judge should be given immunity in any case where he knowingly suffers or allows perjured testimony to occur in his courtroom in any criminal proceeding; whether if such a judge who knowingly suffers or allows perjury to occur in his court when offered by the prosecution should not receive immunity, whether then a District Attorney should be granted "quasi-judicial" immunity.

(9) Whether, given a violation of federal civil rights, a cause of action against a Deputy District Attorney under 42 U.S.C. 1983 should be allowed to stand, at least under the limited circumstances present in the case at bar, where:

a. the District Attorney *has already been found* by a United States District Judge to have knowingly used perjured testimony to convict the petitioner Paul Kern Imbler, 298 F. Supp. 795 (C.D. Calif. 1969);

b. this finding was made during procedures leading to the grant of a petition for writ of habeas corpus under 28 U.S.C. 2254 for, inter alia, the knowing use of perjured testimony to convict the petitioner Paul Kern Imbler, on the part of the defendant herein, Deputy District Attorney Richard Pachtman.

(10) Whether, in view of the substantial number of cases now in record involving 42 U.S.C. 1983 lawsuits

against District Attorneys in the Federal Circuit Courts of Appeals reaching conflicting results, this Honorable Court should finally resolve the conflict of authority now existing between the Ninth Circuit and such other circuits as the Fifth, Sixth, and Seventh Circuits. See *Hilliard v. Williams* 465 F.2d 1212 (6th Cir. 1972) Appendix A-1.

SUMMARY STATEMENT OF FACTUAL BACKGROUND OF CASE.

The litigation now pending before this Honorable Court has at least a 15-year history dating back to circa 1961.

On August 10, 1961, Petitioner Paul Kern Imbler was convicted of one count of first degree murder and one count of assault with a deadly weapon with intent to commit murder. At that trial he was prosecuted by Respondent Deputy District Attorney Richard Pachtman of the Los Angeles County District Attorney's staff. Imbler was represented by an assigned Deputy Public Defender, one James P. Nunnelley.

The judgment was affirmed unanimously by the Supreme Court of the State of California on automatic appeal as provided by California Penal Code Section 1239(b). *People v. Paul Kern Imbler*, 57 Cal.2d 711, 21 Cal. Rptr. 568, 371 P.2d 304 (1962), Single Appendix Pages 8 through 14. Following Imbler's alleging that his conviction was obtained by the knowing use of perjured testimony on the part of the prosecution and certain Los Angeles Police officers, and moreover by virtue of suppression of fingerprint evidence tending to exonerate him, the California Supreme Court ordered an evi-

dentiary hearing. A retired Supreme Court Justice, the Honorable Thomas White, was appointed as a fact-finding referee. After consideration of the evidence presented and consideration of the referee's findings of fact and conclusions of law, the California Supreme Court denied relief. *In re Imbler*, 60 Cal.2d 554, 35 Cal. Rptr. 293, 387 P.2d 6 (1963), Cert. denied 379 U.S. 908, 85 S.Ct. 196, 13 L.Ed.2d 181 (1964) (Single Appendix, Pages 14 through 29). Shortly thereafter, a second petition for Writ of Habeas Corpus in the California Supreme Court succeeded in setting aside the Death Penalty for errors condemned by that Court in *People v. Morse*, 60 Cal.2d 631; *In re Imbler*, 61 Cal.2d 556, 39 Cal.Rptr. 375, 393 P.2d 687 (1964). Thus Petitioner Imbler spent nearly four years constantly under threat of execution in the California gas chamber at San Quentin Penitentiary. After the setting aside of the death sentence, the prosecution elected to stipulate to a life sentence rather than retry the penalty, and Imbler was removed from Death Row and eventually confined in the State maximum security penitentiary at Folsom. He was to remain there until March 24, 1971, when he was formally set free as a result of a grant of a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 by United States District Judge Warren J. Ferguson of the Central District of California. *Imbler v. Craven*, 298 F.Supp. 795, 812 (C.D. Calif. 1969). (Single Appendix, Pages 30 through 60.) Prior to obtaining relief under 28 U.S.C. 2254, Imbler successfully prevailed in the U.S. Ninth Circuit to allow the District Court to consider his petition, he taking advantage of the change in Federal Habeas Corpus law wrought by this Honorable Court in overruling *McNally v. Hill*, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1931)

by *Peyton v. Rowe*, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). *Imbler v. Oliver*, 397 F.2d 277 (9th Cir. 1968).

Following the grant of relief under 28 U.S.C. 2254, Imbler prevailed in efforts of the State of California to appeal to the U.S. Ninth Circuit, *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 864.

In 1971, Petitioner Imbler brought the instant civil rights suit under 42 U.S.C. 1983 against Deputy District Attorney Pachtman and various members of the Los Angeles Police Department for, inter alia, the knowing use of perjured testimony by Pachtman and suppression of evidence favorable to him. *Napue v. Illinois*, 360 U.S. 264; *Mooney v. Holohan*, 294, 103; *Giles v. Maryland*, 386 U.S. 66; *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Pyle v. Kansas*, 317 U.S. 213; *Miller v. Pate*, 386 U.S. 1; *Brady v. Maryland*, 373 U.S. 83, 87; and the cases therein cited, as compiled in *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969).

United States District Judge Robert J. Kelleher dismissed the suit against Respondent District Attorney Richard Pachtman but left the suit intact against the defendant police. (Single Appendix, Pages 104 - 113); *Monroe v. Pape*, 365 U.S. 167; by analogy, see *Webster Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); which, while not dealing with the defendants acting under color of *state* law, is apparently instructive as a Federal Judicially created counterpart.

On appeal, the United States Court of Appeals for the Ninth Circuit split 2 - 1 in affirming the dismissal. *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Single Appendix, pages 116 through 125).

A petition for rehearing and a suggested hearing *En Banc* were similarly rejected by a 2 - 1 vote (Single Appendix, Page 126).

The United States Supreme Court granted certiorari on February 24, 1975 (Single Appendix, Page 127).

The case presents for determination the nationally consequential issue of the scope of immunity to be accorded to the prosecution state's attorney in a Federal Civil Rights suit brought under 42 U.S.C. 1983 and related statutes. It is an issue not ever fully resolved by this Honorable Court, and an issue apparently creating a conflict in results among the leading United States Courts of Appeals which have considered the issue. See, for example, and compare *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) with the instant case, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974). (Appendix A-1; Single Appendix, 30-60, this brief inclusive.)

SUMMARY OF SIGNIFICANCE OF DEPRIVATION OF FOURTEENTH AMENDMENT DUE PROCESS OF LAW PERPETRATED BY RESPONDENT PROSECUTOR PACHTMAN

Paul Kern Imbler, petitioner herein, was tried for and convicted of the murder of one Morris Hasson, a proprietor of a small Los Angeles grocery store run by Hasson and his wife. No apparent motive appeared for the crime. Two men entered the store on the evening of the crime and made no demand for money. One of them shot Hasson without saying a word. Mrs. Hasson survived but failed to identify Imbler as one of the perpetrators.

One Alfred Costello was a spectator to the crime from a vantage position across the street. He noted the emergence of the two men from the store and gave chase, the killer unsuccessfully firing a gun shot at Costello. To aid in his escape, the killer quickly removed a topcoat and discarded it. Contained in the coat was the gun and a plastic safety razor case.

Costello was to eventually testify at Imbler's trial, naming Imbler as one of the culprits.

During cross-examination, Imbler's Court-appointed public defender inquired of Costello whether in fact Costello had been in an insane asylum. Costello falsely answered that he had voluntarily placed himself in the mental hospital. The prosecutor knew that in fact Costello had been committed there because of being found not guilty by reason of insanity by the Los Angeles Superior Court in at least one criminal case. This constituted a violation of *Napue v. Illinois*, 360 U.S. 264, a failure to correct known false testimony when it was offered. In an effort to rehabilitate Costello before the jury, Prosecutor Richard Pachtman, respondent herein, led Costello into a series of inherently incredible accomplishments, concerning Costello's education achievements, the bulk of which were allegedly attained at a time when Costello was either commited to the insane asylum or was physically in San Quentin State Prison. Thus, Pachtman led Costello to testify that he obtained a four-year Bachelor's degree in Industrial Relations from the University of California in the genius-level time of but two years and that he followed this with a degree in engineering from the University of Southern California in night school, obtaining that degree in 1954. Official records placed Costello in San Quentin State Prison

from 1951 through November, 1953. The prosecutor, after soliciting this false evidence, again failed to correct it. In a further effort to bolster Costello, the prosecutor elicited from him the statement that he, Costello, was then endeavoring to "go straight" by being employed as an engineer with the Los Angeles based Carnation Milk Company, making an average of $9,000 - $10,000 per year for the last four years. The prosecutor knew of this falsehood, for at the very instant Los Angeles Police were awaiting the conclusion of Costello's testimony in order to affect his arrest for "bad check charges." At Respondent Prosecutor Pachtman's request, the police had refrained from the arrest until Pachtman concluded use of Costello, the latter being the State's key witness against Imbler. In addition, although possessing knowledge that Costello had been convicted of at least three felonies, Pachtman allowed Costello to admit to but one felony conviction.

Other police-related violations of the Due Process rights of Petitioner Imbler such as the police-related falsification of key fingerprint information occurred in the case, the summary of which can be found in *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Appendix Pages 30 through 60).

At issue before this Court is whether such wilful violations of Due Process of Law and of the constitutional rights of Paul Kern Imbler, and which were instrumental in causing the grant of relief under 28 U.S.C. 2254, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969), are *discretional* acts *within the normal scope of the prosecutorial function* so as to isolate Respondent District Attorney Pachtman from a Civil Rights suit under 42 U.S.C. 1983.

It is the petitioner's contention that the performance of the foregoing illegal and unprofessional non-discretionary acts strip the cloak of immunity from the shoulders of the prosecutor and give rise to a Civil Rights cause of action under 42 U.S.C. 1983. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). Because of the prohibited nature of such acts, "good faith" performance can be no defense. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213; *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Miller v. Pate*, 386 U.S. 1; *Giglio v. United States*, 405 U.S. 150; *Napue v. Illinois*, 360 U.S. 264; *DeMarco v. United States*, 415 U.S. 449; *United States v. Butler*, ____ F.2d ____ (9th Cir. 1974); *Imbler v. Craven*, 424 F.2d 631 (9th Cir. 1970), cert. den. 400 U.S. 865 (1971).

It is clear that this respondent, an experienced prosecutor, knew, or *should have known with the exercise of any element of consideration*, that his acts were illegal deprivations of Due Process of Law and had been already condemned in a multiplicity of rulings by this Honorable Court. The foregoing illegal and unprofessional prohibited prosecutorial acts are not acts of discretion and because of their nature can not realistically be considered to be within the normal prosecutorial function. As such, the prosecutor can be accorded no immunity, and liability must lie in a 42 U.S.C. 1983 lawsuit.

SUMMARY OF ARGUMENT

I.

The decided cases giving immunity to a District Attorney against a Federal Civil Rights lawsuit brought against him under 42 U.S.C. 1983 and related statutes usually base that immunity on the assertion that he must be protected when he is making

(1) good faith discretional decisions
(2) within the scope of the normal or usual prosecutorial function or duty.

Petitioner was granted a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 in the Central District of California in April, 1969 by United States District Judge Warren J. Ferguson. *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) (Appendix, Pages 30 through 60). Inter alia, that Writ of Habeas Corpus was granted for the knowing use of perjured testimony used to achieve the conviction by the respondent herein, Los Angeles County District Attorney Richard Pachtman.

Speaking generally, the past history of 42 U.S.C. 1983 lawsuits directed against state prosecutors has not been favorable to the plaintiffs. In general, the Federal District Courts have been quick to grant immunity under the aegis of a "quasi-judicial" role occupied by the prosecutor. In a same general vein, the Federal Circuit Courts have found such similar immunity.

The exceptions have taken at least two recognized forms:

(1) A finding that the prosecutor had abandoned his role as a prosecutor, embarking into a non-prosecutorial function, with the rationale

that he should not then be given his cloak of protection;[1]

or much less prevalent,

(2) an outright rejection of the quasi-judicial immunity even though the prosecutor was apparently functioning fully within his mechanical role as a prosecutor;[2]
that is, the prosecutor's act is deemed sufficiently flagrant that he was denied the umbrella of immunity even though the act was an "integral part" of the prosecutorial function. The latter type of case is the one at bar and the one we seek to establish non-immunity therein.

Some cases[3] have overtly held that *illegal* acts of the prosecutor, even though done in the actual trial in the actual courtroom scenario, are not within the *legitimate* scope of the prosecutorial function, and have suggested that under those circumstances suit should lie under 42 U.S.C. 1983.

Under the decided cases of this Honorable Court, as well as other leading Federal and State Courts, the knowing use of perjured testimony by a prosecutor to achieve a criminal conviction is not

(1) done in good faith;
(2) a discretionary act, but in fact is absolutely forbidden;
(3) within the legitimate scope of the duties of a state prosecutor.

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[1] *Robichard v. Ronan*, 351 F.2d 533 (9th Cir. 1965)

[2] *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972); *Imbler v. Pachtman*, 500 F.2d 1301, (9th Cir. 1974) (Kilkenny, C.J., dissenting)

[3] *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) (Kilkenny, C.J., dissenting)

Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed 791 (1935); *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L.Ed. 932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Evans v. Eyman*, 363 F.2d 540, 542 (9th Cir. 1966); *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969); *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 690 (1967); *White v. Ragen*, 324 U.S. 760, 65 S.Ct. 978, 89 L.Ed. 1348 (1945); *In re Ferguson*, 5 Cal. 3rd 525. Compare *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) for similar principles. See also *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1972), cert. den. 375 U.S. 931, 84 S.Ct. 331, 11 L.Ed.2d 263 (1963); *Jackson v. Wainwright*, 30 F.2d 288 (5th Cir. 1968) (collecting cases); compare *Lessard v. Dickson*, 394 F.2d 88 (9th Cir. 1968), especially noting dissent by Ely, Circuit Judge; *Levin v. Katzenbach*, 124 U.S. App. D.C. 158, 363 F.2d 287 (1966); *Luna v. Beto*, 395 F.2d 35 (5th Cir. 1968); *Barbee v. Warden*, 331 F.2d 842 (4th Cir. 1964); compare *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968); see also *Nash v. Illinois*, 389 U.S. 906, 88 S.Ct. 222, 19 L.Ed.2d 223 (J. Fortas, C.J. Warren, J. Douglas dissenting from Denial of Certiorari).

Because the knowing use of perjured testimony by a prosecutor to achieve a criminal conviction is not an act of good faith discretion within the *legitimate* scope of prosecutorial duties, there should be no immunity accorded to the prosecutor, and suit under 42 U.S.C.

1983 and related statutes must not be dismissed on the face of the pleadings.

At least one major Federal Circuit has held that this sort of illegal prosecutorial behavior is not insulated from suit under 42 U.S.C. 1983. *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972). (Appendix A-1, this brief)

II.

At least where a Federal Writ of Habeas Corpus under 28 U.S.C. 2254 has been granted for, inter alia, the knowing use of perjury on the part of the prosecutor, the suit should lie; the usual rationale offered for disallowing said lawsuits then no longer appertains, and the prosecutor cannot be said to be required to dissipate his time defending spurious, unsubstantial lawsuits.

III.

Presently existing law makes clear that some of the acts of Prosecutor Pachtman were in the nature of a police function, and hence are today not protected under the concept of "quasi-judicial" immunity in any event.

IV.

The prosecutor is an arm of the executive branch of government, and thus is amenable to suit within the meaning of the decision of this Honorable Court in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); his "immunity" can no longer be said to "derive" from that "enjoyed" by a member of the judiciary.

V.

If the prosecutor knew, or reasonably should have known, that his behavior would result in the deprivation of the Civil Rights of a party he was then prosecuting, he will be held liable. *Wood v. Strickland*, ____ U.S. ____, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975) (Appendix A-2, this brief). This is under a *negligence* theory as opposed to a theory of wilful misconduct.

ARGUMENT

I.

THE KNOWING USE OF PERJURED TESTIMONY BY A PROSECUTOR, EVEN WHEN DONE DURING THE TRIAL PROCEDURES IN A STATE CRIMINAL PROSECUTION FOR MURDER, IS NOT A GOOD-FAITH ACT OF DISCRETION WITHIN THE SCOPE OF LEGITIMATE PROSECUTORIAL DUTIES SO AS TO INSULATE THE PROSECUTOR AGAINST LIABILITY IN A 42 U.S.C. 1983 FEDERAL CIVIL RIGHTS SUIT.

The multitude of cases cited within this argument and elsewhere in this brief indicate a general immunity against Federal Civil Rights liability under 42 U.S.C. 1983 to a District Attorney or Government prosecutor who is honestly acting within the scope of his standard prosecutorial function, for his good faith discretionary acts.

The considered analysis of the cases indicate several principles:

1. If the prosecutor acts outside the scope of the role normally assumed by a prosecutor, such as becoming a quasi-policeman, exercising a police-oriented role, the immunity is lost. Thus a prosecutor who plans or participates in warrantless raids, or searches and seizures, or who coerces confessions, or who actively moves witnesses out of the consulting range of their counsel has been deemed to be performing police-related functions rather than prosecutorial functions, and the immunity has been lost. Thus, a broad, but much smaller, category of 42 U.S.C. 1983 cases recognize that a prosecutor is not immune to suit brought under the statute if the prosecutor acts in a role other than "quasi-judicial," or other than in his usual role as an attorney for the Government or State, performing functions normally considered to be part of that prosecutorial role.[1]

[1] *Balistrieri v. Warren,* 314 F.Supp. 824 (W.D. Wis. 1970) (Wisconsin State Attorney General, his assistant and others at his direction entered plaintiffs liquor bar during the evening, checking customers' identification and liquor supplies, "stopping the operation of plaintiff's business;" held, sufficient behavior as a *police function* to require denial of motion to dismiss under the quasi-immunity doctrine of the prosecutor.) *Robichard v. Ronan,* 351 F.2d 533 (9th Cir. 1965) (Arizona State Prosecutor participated in confining female juvenile in "drunk tank" with female adult prisoners for 25 days without according preliminary hearing, attempting to coerce a confession, forcing juvenile to go unwillingly to scene of crime to induce a confession, telling the juvenile that only the sheriff and the prosecutor could help her even though she had counsel, and then only if she told them the "truth," and further holding the juvenile without any initial probable cause; held, prosecutor acting in the traditional *police role* shall not remain under the cloak of quasi-judicial immunity.) *Lewis v. Brautigam,* 227 F.2d 124, 55 A.L.R.2d 505 (5th Cir. 1955) (State's Attorney held not to have acted within scope of jurisdiction or as authorized by law by attempting coerced guilty plea to criminal charges, directing deputy sheriffs to remove criminal defendant from jail to state prison 300 miles away to thwart defense attorneys from preparing defense to murder charge; if prosecutor directs police in unlawful manner, the prosecutor abandons his "quasi-judicial" immunity and becomes in effect a policeman who has no similar immunity.) See also *Corsican Productions v. Pitchess,* 338 F.2d 441 (9th Cir. 1964). In *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970) (City Attorneys not given 42 U.S.C. 1983 immunity when they are giving legal advice to a public entity in respect of matters that are not the subject of pending litigation; these acts were not an integral part of the judicial process.

2. If the prosecutor remains within the normal role commonly conceded to be the day-to-day tasks performed by a prosecutor, he is to be given immunity for the *discretionary acts done by him* in the *good faith* performance of his *normal* prosecutorial role.[2] Thus, surely the decision whether to prosecute or not based on a good faith evaluation of evidence presented has insulated the prosecutor from a 42 U.S.C. suit for malicious prosecution, and it can be conceded that it should, and that he should be provided with that immunity. The cases are

many and varied, and the bulk of them indicate that the prosecutor was performing his task in an honest manner within the normal scope of his duties. As should be evident from a perusal of the cases sampled and gathered in Footnote 2, not all of the prosecutors appeared to be upright gentlemen, and some courts sanctioned highly unethical behavior under varied guises of elastic judicial rationalization.

3. Cases of more recent origin have more thoughtfully and eruditely examined into the actual act perpetrated by the prosecutor, and even though it was done physically during a trial, such as the offering of false and perjured physical evidence, the prosecutor has not been accorded immunity. The instant case presents such a picture – a prosecutor knowingly using and suffering perjured testimony to occur during a criminal prosecution for first degree murder at which the Death Penalty was sought and was awarded, and was almost carried out on two occasions.

In *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973) the District Court refused to dismiss a 42 U.S.C. 1983 suit against State Prosecuting Attorney Vavreck where the complaint alleged that he conspired with police to direct police activity in a warrantless search and seizure and raid on the home of the plaintiff. This clear "police related activity" pierced the "quasi-judicial" immunity enjoyed by the prosecutor.

In *Peterson v. Stanczak*, 48 F.R.D. 426 (1969), the 42 U.S.C. 1983 suit survived dismissal where it was alleged that the prosecutor coerced a plea of guilty and suppressed evidence favorable to the plaintiff, as well as encouraging the mistreatment of the plaintiff in order to induce a confession. 48 F.R.D. 426, 431 (1969) The Court held that "there is no doctrine of absolute immunity for prosecuting attorneys . . ." 48 F.R.D. 426, 432. See also *Littleton v. Berbling*, 468 F.2d 389, 410 (7th Cir. 1972) cert. den. 414 U.S. 1143 (1974).

Additional authority that prosecutors have no immunity in 42 U.S.C. 1983 suits when they are doing something other than

Hilliard v. Williams, 465 F.2d 1212 (6th Cir. 1972) draws the line on where prosecutorial immunity granted to prosecutors must end, where the act assailed is not discretionary, is not done in good faith, and is an act in fact actually prohibited by all Canons of Ethics and all decisions of this Honorable Court.

The Sixth Circuit said, regarding the wilful falsification of key and critical blood evidence in a homicide case:

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quasi-judicial tasks is provided by *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973) (A prosecutor who either plans or participates in an illegal raid upon a person's home is liable under the act.) See *"Federal Civil Rights Acts – Civil Practice"* by Professor C.J. Antieau (1974 Supplement, Section 40, Page 72, Note 31 for a compilation of late authorities. Lawyers co-operative Publishing Company, Rochester, New York 14603; Bancroft-Whitney Company, San Francisco, California 94107.)

[2]Cases unholding the immunity accorded to prosecutors under 42 U.S.C. 1983 suits are many. *Barnes v. Dorsey*, 480 F. 2d 1057, 1060 (8th Cir. 1973)) (prosecutor held to be acting within scope of duty as prosecutor doing acts properly categorized as prosecutorial rather than investigatory; thus, he was cloaked with same immunity as judge; opinion devoid, however, of concrete allegations of prosecutorial misbehavior to enable independent analysis of its correctness); *Wilhelm v. Turner*, 431 F.2d 177, 180 - 183 (8th Cir. 1970) (Iowa Attorney General had "probable cause" and "acted in good faith" in seizing allegedly obscene newspaper on Grinnell College campus; even though role was arguably "investigatory" rather than "prosecutorial," the investigatory defense of "good faith" established immunity under 42 U.S.C. 1983 suit against Iowa Attorney General). *Fanale v. Sheehy*, 385 F.2d 866, 868 - 869 (2d Cir. 1967) (Complaint against prosecutor vague but Second Circuit opinion apparently makes it clear that sole prosecutorial act assailed was the discretionary act whether to prosecute or not; but see concurring opinion of Feinberg, C.J. 385 F.2d 866, 869); *Rhodes v. Meyer*, 334 F.2d 709, 717 - 718 (8th Cir. 1964) (prosecuting attorney held immune for performance of *official* tasks in connection with

"The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

"EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our

prosecution of 42 U.S.C. 1983 plaintiff for contempt); *Hurlburt v. Graham*, 323 F.2d 723, 725 (6th Cir. 1963) (prosecutor given immunity in 42 U.S.C. 1983 suit brought by plaintiff he had prosecuted in a reckless driving case; no concrete allegations of prosecutorial misconduct, prosecutor appeared to be acting fully within proper areas of legitimate use of his office.) *Phillips v. Nash*, 311 F.2d 513, 516 (7th Cir. 1962) (prosecutor could not be sued in 42 U.S.C. 1983 suit for alleged failure to afford plaintiff a speedy trial of criminal charges); *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971) (42 U.S.C. 1983 immunity for assistant state attorney sued for common law malicious prosecution and false arrest; the original criminal case against the plaintiffs had been dismissed for want of prosecution). See also *Madison v. Purdy*, 410 F.2d 99 (5th Cir. 1969) for an earlier opinion in a prior appeal of this case. See also *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970) (42 U.S.C. 1983 suit against, inter alia, a prosecutor and judge dismissed for quasi-judicial immunity provided that the acts are within the scope of his jurisdiction and *are authorized by law.*) See also *Peek v. Mitchell*, 419 F.2d 575 (6th Cir. 1970); *Carmack v. Gibson*, 363 F.2d 862 (5th Cir. 1966); *Friedman v. Younger*, 282 F. Supp. 710 (C.D. Calif. 1968). *Brown v. Joseph*, 463 F.2d 1046, 1048 (3rd Cir. 1972) (Third circuit, without extensive analysis of the factual basis for

system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the [sic] to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.'

'DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer

'(A) A public prosecutor or other government lawyer shall not institute or cause to [sic] instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

the 42 U.S.C. 1983 complaint, reasserted previous decisions of that circuit, granting immunity to state prosecutors "unless their acts are clearly outside the scope of their jurisdiction." *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Kauffman v. Moss*, 420 F.2d 1270 (3rd Cir. 1970) (suit against a public defender who plead his client guilty and failed to take appeal; state post-conviction remedies proved unsuccessful and 42 U.S.C. 1983 suit followed.)

Arensman v. Brown, 430 F.2d 190, 192 - 194 (7th Cir. 1970) (State Prosecutor immune where his only acts were the good-faith *discretionary* act of filing criminal charges in assault and resisting arrest case arising out of lawful attempt to arrest plaintiff for a contempt arising out of a failure to provide marital support order; prosecutor is to be "immune from liability in the discharge of his *official* duties." 430 F.2d 190, 193; the Seventh Circuit adopted language from *Bauers v. Heisel*, 361 F.2d 581, 590 (3rd Cir. en banc 1966), giving "quasi-judicial" immunity to a prosecutor "... because his office is vested with a vast quantum of *discretion* which is necessary for the vindication of

'(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.'

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of 'duties constituting an integral part of the judicial process.' We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant."

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the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. . ."). *Bauers v. Heisel,* 361 F.2d 581, 589 (3rd Cir. 1966 en banc) (Prosecutor immune from 42 U.S.C. 1983 lawsuit brought by juvenile who asserted that prosecutor wrongly prosecuted him in adult court when only proper forum was a juvenile court; but see Hastie, C.J., concurring in result, 361 F.2d 581, 592, and Biggs, C.J. and Freedman, C.J., in separate dissents; Judge Hastie said: ". . . I do not share the view of the majority that the doctrine of "judicial immunity" protects whatever acts of a public prosecutor are "done in his official capacity" or are not "clearly outside his jurisdiction." Judge Freedman said: "I would not equate the trial conduct of a prosecutor with the adjudicatory role of a judge, whose duties involve a process so delicate that it would be undesirable to subject him to inquiry by suit under the Civil Rights Act. An advocate stands in a totally different position and I do not believe that the state's advocate should be any more immune than the defendant's advocate, who is licensed by the State, or its police officers. I, therefore, dissent from the view

In *McCray v. State of Maryland,* 456 F.2d 1, 3 (4th Cir. 1972) the Court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they *exercise a discretion* similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. *Where an official is not called upon to exercise judicial or quasi-judicial discretion,* courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system."

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that a prosecutor is in all cases immune from liability under the Civil Rights Act." (361 F.2d 581, 594).

Sires v. Cole, 320 F.2d 877 (9th Cir. 1963) (In a 42 U.S.C. 1983 suit, plaintiff sued a judge and a prosecutor for wrongly sentencing him, and participating in sentencing him for a felony when in reality his calf-stealing crime was a misdemeanor; in dismissing,. the Ninth Circuit merely stated "a prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a Civil action for damages as that which protects a judge." 320 F.2d at 879 - 880.)

Harmon v. Superior Court, 329 F.2d 154 (9th Cir. 1964) (In this action under 42 U.S.C. 1983, a disappointed domestic relations litigant's suit against, inter alia, a prosecutor was dismissed because the acts complained of were "quasi-judicial acts" done by them in the exercise of their "quasi-judicial functions," and thus they were to be accorded immunity.)

Agnew v. Moody, 330 F.2d 868, (9th Cir. 1964) (Dismissal of 42 U.S.C. 1983 suit against a city attorney who had prosecuted the plaintiff for a minor traffic ticket under the quasi-judicial immunity doctrine). The foregoing three Ninth Circuit cases regretfully present little solid, honest, salient district attorney violations, and the three plaintiffs, unlike *Paul Kern Imbler,* were charged respectively, with calf-stealing, failure to support minor

In *Lewis v. Brautigam*, 227 F.2d 124, 129 (5th Cir. 1955) the Court said:

> "[A] quasi-judicial officer, such as a prosecuting attorney, *who acts outside the scope of his jurisdiction and without authorization of law*, cannot shelter himself from liability by the plea that he is acting under color of office."

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children, and minor traffic violations. The Ninth Circuit uses all three in support of an automatic dismissal of Imbler's serious Civil Rights complaint. (Appendix, Page 117). As an example of a more substantial deprivation of Due Process, in *Ney v. State of California*, 439 F.2d 1285 (9th Cir. 1971), a 42 U.S.C. 1983 dismissal was approved by the Ninth Circuit in spite of allegations of knowingly altered electronic tapes being used in a criminal proceeding by a prosecutor. See also *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966) (A prosecutor is to be accorded immunity if his acts were commited in the performance of an integral part of the judicial *process;* the Ninth Circuit, in affirming Imbler's dismissal, sanctioned the *perjury* because it occurred as an integral part of the judicial process); *Marlowe v. Coakley*, 404 F.2d 70 (9th Cir. 1968) (Dismissal of 42 U.S.C. 1983 suit affirmed where allegation was that prosecutor knowingly and wilfully, or with gross negligence, presented perjured testimony to the grand jury investigating the plaintiff's activities; in spite of whether it was perjured or not, "a California District Attorney's presentation of evidence to a grand jury is clearly within the scope of his duty to advise and present information to the grand jury as authorized by California law. . ."). The doctrine of prosecutorial immunity is at least 50 years old. *Yaselli v. Goff*, 12 F.2d 396, 56 A.L.R. 1239 (2d Cir. 1926) (*Yaselli* was one of the early Federal cases according immunity to the United States Attorney: "A United States Attorney, if not a judicial officer, is at least a quasi-judicial officer, of the government. He exercises important judicial functions, and is engaged in the enforcement of the law. The reasons for granting immunity to judges, jurors, attorneys, and executive officers of the government apply to a public prosecutor in the performance of the duties which rest upon him. To hold that an attorney of a private client is clothed with absolute privilege and that a public prosecutor, whose duty it is to

The foregoing non-discretional act of the prosecutor, clearly done in the absence of good faith, and clearly an act prohibited by decisions of this Court, clearly thus give rise to a valid 42 U.S.C. 1983 Federal Civil Rights suit. *Mooney v. Holohan*, 294 U.S. 103; *Pyle v. Kansas*, 317 U.S. 213, *Alcorta v. Texas*, 355 U.S. 28; *Hysler v. Florida*, 315 U.S. 411; *Miller v. Pate*, 386 U.S. 1; *Giglio v. United States*, 405 U.S. 150; *DeMarco v. United States*, 415 U.S. 449; *Napue v. Illinois*, 360 U.S. 264; *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969).

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enforce the laws of the United States, is not exempt because of what he says and does in the discharge of the duties of his office, is so unreasonable, so contrary to sound public policy, and to the fundamental principles of our jurisprudence that we cannot accept it."; 12 F.2d at 404). *Kenney v. Fox*, 232 F.2d 288, 290 (6th Cir. 1956) ("A prosecuting attorney is a quasi-judicial officer and enjoys the same immunity from a civil action for damages as that which protects a judge acting within his jurisdiction over the parties and the subject matter of the litigation;" *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959) (Illinois prosecutors given 42 U.S.C. 1981 - 1983 immunity even though it appeared true that they sought and obtained a $1,000 bail for an offense charged against plaintiffs where maximum punishment, even if conviction would eventually result, was a $200 fine; the Seventh Circuit, conceding the conduct "reprehensible," nonetheless found that the great weight of authority was against liability of the prosecutor; 267 F.2d 237, 239); *Peckham v. Scanlon*, et al., 241 F.2d 761, 763 (Illinois prosecutors given 42 U.S.C. 1983 - 1985 immunity against allegations that they resisted inmate-plaintiff in securing a transcript for post-conviction relief of his trial in which he suffered a criminal conviction, and urging dismissal of the case because of the absence of said transcript. The Seventh Circuit said "the allegations of the complaint leave no doubt but that any and all acts charged against the Judge and the Assistant State's Attorney were performed in the discharge of their *official* duties . . . such officials are immune to prosecution of a suit of

Cases following *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972) have recognized the difference between *discretional* and *non-discretional* acts of the prosecutor.[3]

In general it can be seen from a close perusal of the majority of the foregoing cases that upheld the immunity to the prosecutor, that the acts of the prosecutor were:

(1) acts done *in good faith;*

(2) *discretional acts* done in the day-to-day decision making process;

(3) done within the scope of the *legitimate* prosecutorial function.

We submit, that, quite to the contrary, *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) presents a case of a prosecutor wilfully, premeditatively and maliciously using perjured testimony to achieve a

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the instant character. . ."); *Jennings v. Nester*, 217 F.2d 153, 155 (7th Cir. 1954) (State's Attorneys when acting in their official capacities are protected by the same immunity in civil cases that is applicable to judges; prosecutors appeared to act solely in normal prosecutorial role in convicting plaintiff, who was still an Illinois inmate, of a felony; the opinion is devoid of concrete facts upon which to evaluate its result.)

Crawley v. Warren, 216 F.2d 74, 75 - 76 (7th Cir. 1954) (42 U.S.C. 1983 - 1985 suit dismissed in spite of allegation that defendant prosecutor *conspired* to procure grand jury indictments wilfully and wantonly, without use of either competent witnesses or competent evidence; the Seventh Circuit simply enunciated an apparent Carte Blanche immunity to Illinois prosecutors equivalent to that enjoyed by the judiciary, holding that ". . . as a matter of public policy, such an injured person is without relief in a Civil proceeding. . .") (216 F.2d 74, 77).

Some of the older cases push the limits of intellectual reasoning on the immunity concept to the absurd: ***Laughlin v.***

criminal conviction for murder, much as *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

We assert that the use of perjured testimony by a state or federal prosecutor in a state or federal criminal proceeding is clearly *not a good-faith act of discretion*, and one therefore that is forbidden by the decisions of all of the major courts and jurisdictions that have considered it. Further, it is not within the *legitimate* prosecutorial function. (Kilkenny, C.J., dissenting in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) [Appendix, Page 116-125]). *Hilliard v. Williams*, 465 F.2d 1212, 1217-1218 (6th Cir. 1972).

Rosenman, 82 U.S. App. D.C. 164, 163 F.2d 838 (D.C. Cir. 1947) (This amazing decision found no liability in a complaint which alleged that the prosecutor, from ulterior motives, knowingly and wilfully concocted false testimony against the plaintiff; essentially the decision sanctions even the knowing use of perjury as long as it was done within the normal prosecutorial function, citing *Cooper v. O'Connor*, infra); In *Cooper v. O'Connor*, 69 App. D.C. 100, 99 F.2d 135, 118 A.L.R. 1440 (D.C. Cir. 1938), general immunity was accorded if the acts charged came within the scope of the prosecutor's official duty, in spite of an allegation in the complaint that the acts were done maliciously and without probable cause; the reason for the rule was "simply one of public policy." 99 F.2d 135, 141. *Mitchell v. Greenough*, 100 F.2d 184, 186 - 187 (9th Cir. 1938), contains the frightening analysis that even if a prosecutor perpetrates false testimony in a ciminal case, the victim defendant is not denied "equal protection of the law" because the same aberrant prosecutor has the same illegal chance as all other defendants unfortunate enough to come into his clutches!!! At 100 F.2d 184, 186 - 187 we find the following fantastic intellectual non-sequiturs:

> ". . . Appellant was subjected to no greater hazard that any other individual in the state, namely, the hazard of being prosecuted for a crime and convicted by false testimony, and if the prosecuting officer of the county were sufficiently corrupt to use his high office for the

We assert that no thinking Court would grant prosecutorial immunity under 42 U.S.C. 1983 to such forbidden behavior. It is clear that the instant district attorney respondent *knew*, or in the exercise of simple contemplation *should have known* of the illegality of his unprofessional acts and as such he should not be shielded by this sort of case-created, judicially decreed "quasi-judicial" immunity.

We assert that this case against the respondent district attorney should not have been dismissed on the pleadings before trial on the merits by United States District Judge Robert J. Kelleher of the Central District

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purpose of convicting innocent people by perjured testimony, *all* of the citizens within his jurisdiction would be subject to the same hazard . . ."

In *Mitchell v. Greenough*, supra, the Civil Rights plaintiff based his cause of action, much as in the case now at bar, on allegations of the knowing use of perjured testimony within the meaning of *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; 100 F.2d at 185 - 186.)

[3] *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973), while noting the existence of *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), found that a public defender enjoyed *qualified* immunity against a 42 U.S.C. 1983 suit where the complaint, even when construed broadly, failed to indicate that the acts complained of fell beyond the scope of the normal prosecutorial function. "In deciding whether to object to evidence, whether to call a particular witness, and how to address the jury, the public defender was performing acts within the scope of his employment. Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was *intentionally* harmful to plaintiff, or otherwise *deliberately* inconsistent with his obligations to plaintiff so as to be a *voluntary* excursion outside the scope of his duties. . ." The major Sixth Circuit decision in *Hilliard v. Williams* has been cited with approval in several lower Federal Courts. In *Haaf v. Grimes*, 355 F. Supp. 542, 545 (D.C.

of California, and the United States Court of Appeals for the Ninth Circuit writing in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974) should be reversed.

The prosecutorial immunity under 42 U.S.C. 1983 and the cases so establishing it should be disapproved, where the complaint clearly alleges deprivations of Due Process of Law in a factual non-conclusionary manner.

II.

WHERE THERE HAS BEEN A PRIOR JUDICIAL DECISION AFFIXING THE ACTS OF THE DISTRICT ATTORNEY AS BEING A DEPRIVATION OF DUE PROCESS OF LAW, THE PROSECUTOR CAN NOT CONTEND THAT HE IS BEING REQUIRED TO APPEAR IN AND DEFEND A FRIVOLOUS LAWSUIT. *IMBLER V. CRAVEN*, 298 F.Supp. 795; *GREGOIRE V. BIDDLE*, 177 F.2d 579 (2d Cir. 1949); *HILLIARD V. WILLIAMS*, 465 F.2d 1212 (6th Cir. 1972).

We have elsewhere set forth in this brief some of the oft-quoted reasons for granting a prosecutor immunity

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Minn. 1973), the Court denied dismissal of a 42 U.S.C. 1983 suit against a prosecutor who allegedly withheld exculpatory evidence favorable to the plaintiff; held, a prosecutor who withholds evidence is liable under Section 1983 per *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972).

In *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973), the District Court refused to dismiss a 42 U.S.C. 1983 suit against prosecutor *Vavreck* where it was alleged that he conspired with police to direct police activity in a warrantless search and seizure and raid on the home of the plaintiff.

from suit under 42 U.S.C. 1983; among those reasons was a desire to insulate the prosecutor from diluting his time to defend unsubstantial, spurious, ill-founded lawsuits. Indeed, that great legal scholar, the late Honorable Learned Hand of the Second Circuit in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) *embraced* the suit against the prosecutor if it were only possible to discern the good from the bad suits before actual trial. Under the facts of the instant case (See Appendix, Pages 30-60) the prosecutor has admitted to many of the facts that are here contended to be denials of due process to Imbler. Thus, while not a named respondent and participant in the 28 U.S.C. 2254 proceedings ending in *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969), the Respondent District Attorney was sufficiently implicated by his own statements at the evidentiary hearing ordered by the State Supreme Court of California that he can not now contend that he should not be required to defend an insubstantial lawsuit. Thus, we assert to here come as close as possible to the ideal desires of the great late Honorable Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, ____ (2d Cir. 1949), where he said:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The jurisdiction for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to inevitable danger of its outcome,

> would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

See Page 119, Appendix, where the foregoing quotation is seemingly relied upon by the Ninth Circuit 2 - 1 majority to affirm the dismissal on the pleadings; that analysis conveniently omits the very fact that the successful petition for relief under 28 U.S.C. 2254, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) constituted the "preliminary hearing" for prosecutor Pachtman and he can not now be heard to complain that he is being required to defend an ill-founded cause of action.

We assert at the very minimum that this Honorable Court must sanction a 42 U.S.C. 1983 Civil Rights suit against a prosecutor whenever that suit has been preceded by the grant of a Writ of Habeas Corpus by an opinion finding true the allegations of denial of Due Process upon which the 42 U.S.C. 1983 lawsuit is based.

Indeed, it must be remembered that lawsuits such as those sanctioned in *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965), *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955), may at trial prove to be based on fully false, non-sustainable allegations and thus the prosecutor has been put to his defense by the spurious allegations that he was acting like a policeman. Very few actions under 42 U.S.C. 1983 that we are aware of have been preceded by a successful Federal 28 U.S.C. 2254 Writ of Habeas Corpus; we assert that this precedent to the lawsuit is sufficient foundation to at least open the door to a valid cause of action against the prosecutor. In particular, the decision *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969) then provides full and cogent basis for the Federal Civil Rights Suit; surely it creates a more solid foundation for the suit than the mere allegations contained in the pleadings of such cases as *Robichaud v. Ronan*, supra. Hence, at the very minimum, we contend and argue that, under the facts of this case, where 42 U.S.C. 1983 suit was preceded by the favorable act of granting of Federal Habeas Corpus under 28 U.S.C. 2254 in a well-reasoned, detailed opinion by a distinguished Federal Judge, that 42 U.S.C. 1983 suit can not be dismissed on the pleadings for failure to state a cause of action. Under at least these circumstances, prosecutorial liability should be clearly and logically allowed.

III.

UNDER THE LAW ENUNCIATED FROM MANY OF THE UNITED STATES CIRCUIT COURTS, SOME OF THE ACTS OF RE-

SPONDENT PROSECUTOR PACHTMAN WERE NOT WITHIN THE NORMAL ROLE OF A PROSECUTOR AND ARE NOT PROTECTED IN ANY EVENT.

In general, directing the activities of police and police officers in the decision to arrest or refrain from arresting a suspect of a crime is a police function. With full knowledge that Los Angeles Police Officers were at the courtroom to arrest Alfred John Costello for "bad check charges," Respondent Prosecutor Pachtman directed and requested that the arrest not be effected until he, Pachtman, had concluded his use of Costello as the key witness against Imbler. (Appendix Pages 41 - 42). At this time, the respondent had knowledge that Costello had recently written bad checks for relatively small amounts of which some were still outstanding and one of which was the basis of a pending criminal proceeding. (Appendix, Page 41). Nonetheless, Prosecutor Pachtman elicited from Costello the false evidence that he had averaged "$9,000 - $10,000 per year in earnings for the past four years" as an engineer for the Los Angeles based Carnation Dairies. In fact, as set forth in the opinion, *Imbler v. Craven*, 298 F.Supp. 795 (C.D. Calif. 1969, Appendix 30 through 60), Costello had never attended any college, was not an engineer, and was certainly not an engineer with Carnation Dairies earning in excess of $9,000 per year for the last four years. In fact, Costello was either in an insane asylum or in the California State Prison at San Quentin during this key period when he claimed to have achieved the two degrees in Industrial Relations and Engineering. These two degrees would have normally required seven to eight years of effort, taking into account some credit overlap between the two distinctly

different fields purportedly followed by Costello at the two different institutions. In fact, Costello was more or less an itinerant bum, living by his wits in one forgery after another, and had a lengthy arrest history for that activity as revealed by his F.B.I. - C.I.I. "make sheet" in the possession of Respondent Pachtman.

The decision to arrest and the directive or request to refrain from arresting are integral parts of the police function, and if the District Attorney engages in these functions he can not expect to receive "quasi-judicial" immunity. *Balistrieri v. Warren*, 314 F.Supp. 824 (W.D. Wis. 1970) (Prosecutor and police entered liquor bar, interfered with business, etc.); *Robichaud v. Ronan*, 351 F.2d 533 (9th Cir. 1965) (Prosecutor directed police in wide variety of activities normally a police function); *Lewis v. Brautigam*, 227 F.2d 124, 55 A.L.R. 2d 505 (5th Cir. 1955) (Prosecutor attempted to coerce guilty plea, directed removal of defendant to a prison 300 miles from trial situs to interfere with preparation of the defense of the case.); *Corsican Productions v. Pitchess*, 338 F.2d 441 (9th Cir. 1964); *Donovan v. Reinbold*, 443 F.2d 738 (9th Cir. 1970); *Ames v. Vavreck*, 356 F.Supp. 931 (D.C. Minn. 1973) (Prosecutor directed warrantless search and seizure and raid on plaintiff's home); *Peterson v. Stanczak*, 48 F.R.D. 426 (1969) (coerced plea of guilty, suppression of evidence); *Littleton v. Berbling*, 468 F.2d 389 (7th Cir. 1972); *Hampton v. Chicago*, 484 F.2d 602 (7th Cir. 1973) (illegal raids participated in by prosecutor on homes of the Black Panthers, etc.).

While our main thrust for advocating this lawsuit to lie under 42 U.S.C. 1983 against this prosecutor is other than that he acted as a policeman, we are still constrained to point out the obvious police role that

Prosecutor Pachtman occupied in directing police officers in an arrest – non-arrest scenario. As such, immunity must be declined to him.

IV.

THE PROSECUTOR IS AN ARM OF THE EXECUTIVE BRANCH OF GOVERNMENT, AND AS SUCH SHOULD ENJOY NO "QUASI-JUDICIAL" IMMUNITY WITHIN THE MEANING OF THE RECENT DECISION OF THIS HONORABLE COURT IN *SCHEUER V. RHODES*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

We perceive that one of the threshold issues that should be decided and resolved by this Honorable Court is the oft-quoted rationalization that the nation's prosecutors enjoy "quasi-judicial" immunity. This means that they occupy that exalted role assumed by judges; judges having been granted immunity in general, so should the prosecutor, according to this rationale.

Why their immunity, if any, should stem from some "judicial" immunity defies logic, since they are clearly an arm of the executive branch in both Federal and State Government. The Attorney General of the United States is a non-elected cabinet position holding his position at the pleasure of the Chief Executive; the Attorney General chooses his top-level assistants; the various United States Attorneys are nominated by the *President* with the advice and consent of the Senate and are usually out of their jobs with a change in administration. In California, the office of the District Attorney is the Chief law enforcement office of the

County and represents the People before purportedly neutral judges in an adversary manner. Being merely one of the two advocates appearing in an adversary setting before a presumably non-interested judge, it is difficult to logically ascertain why one of these advocates should enjoy some sort of immunity that he supposedly "derives" from the judge before whom he is appearing. In *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (4-17-74), this Honorable Court unanimously pierced the so-called executive immunity veil. See also 471 F.2d 430, reversed. Not only is this decision important for establishing at least qualified executive liability, but it is instructive in other areas of importance to the case sub-judice. The *Scheuer v. Rhodes* complaint alleged, inter alia, that the defendants acted either outside the scope of their respective office, or, if within the scope, acted in an arbitrary manner, grossly abusing the *lawful* powers of office. (40 L.Ed.2d at 96). This Court noted that the issue, in deciding to dismiss, was not whether the plaintiff could ultimately prevail or not but whether the claimant is entitled to offer evidence to support the claims. (40 L.Ed.2d at 96). The allegations of the complaint should be construed favorably to the pleader.

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957). Cited with approval in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 96 - 97, 94 S.Ct. 1683 (1974).

The District Attorney is here a state official, a representative of the State of California, an arm of the executive branch of government. Since *Ex Parte Young*, 209 U.S. 123, 52 L.Ed. 714, 28 S.Ct. 441 (1907), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he has deprived another of a federal right under the color of state law. *Ex Parte Young* teaches that when a state officer acts under a state law in a manner violative of the Federal Constitutions, he

> "comes into conflict with the superior authority of that Constitution and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the Supreme Authority of the United States." 209 U.S. at 159 - 160, 52 L.Ed. 714. Cited 40 L.Ed.2d 90, 97.

Where, as here, the District Attorney is asserted to have violated Federally-protected rights, it is clear that so-called "quasi-judicial" immunity places one executive branch employee above the mandates of the Federal Constitution and Federal Statutes such as 42 U.S.C. 1983 which on their face provide no such immunity.

So much was recognized by Ninth Circuit Judge John F. Kilkenny in dissent in *Imbler v. Pachtman*, 500 F.2d 1301 (9th Cir. 1974); see Apendix, pages 121 - 122. Judge Kilkenny noted that "otherwise, the office of the District Attorney, rather than the Constitution of the United States, becomes the Supreme Law of the Land." (Appendix, Page 122.)

> "When there is a substantial showing that the exertion of state power has overridden private rights secured by (the) Constitution, the subject is

necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals *charged with* the transgression." *Sterling v. Constantin*, 287 U.S. 378, 398, 53 S.Ct. 190, 195, 77 L.Ed. 375 (1932) Single Appendix, Page 122.

While Chief Justice Burger enunciated in *Scheuer v. Rhodes*, supra, his views that the suit should not be barred under asserted Eleventh Amendment auspices, it is clear that the reasoning is appropos of the instant case because of the true *executive branch* role occupied by the Prosecutor Pachtman. The so-called "quasi-judicial" immunity is really thus not an appropriate phrase to affix to the executive-branch prosecutor.

Proceeding on to the issue of whether an "absolute executive immunity" existed, Chief Justice Burger speaking for this unanimous Honorable Court noted that really it was not an absolute, but a *qualified* immunity. (40 L.Ed.2d 90, 98 - 99).

"This absolute immunity apparently rested, in its genesis, on two mutually dependent rationales:

(1) the injustice *particulary in the absence of bad faith* of subjecting to liability an officer who is *required*, by the *legal obligations of his position*, to *exercise discretion;*

(2) the danger that the treat [sic] of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." (40 L.Ed.2d 90, 99)

We note, in passing, the significance of the foregoing duality to the case at bar:

(a) Bad faith is clearly demonstrated and is present in the knowing use of perjury to achieve a state criminal conviction.

(b) There is no exercise of an act of *discretion*, and a *decision of discretion* is not involved in the matter of the use of perjury by a prosecutor; he is absolutely forbidden to use it. *Mooney v. Holohan*, 394 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 794 (1935). *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 38, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957); *Hysler v. Florida*, 315 U.S. 411, 62 S.Ct. 688, 86 L. Ed. 932 (1942); *Pyle v. Kansas*, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942); *Evans v. Eyman*, 363 F.2d 540, 542 (9th Cir. 1966), *Miller v. Pate*, 381 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 692; *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969); *In re Ferguson*, 5 Cal. 3rd 525; *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104; *De Marco v. United States*, 415 U.S. 449, 94 S.Ct. 1185, 39 L.Ed.2d 501; *United States v. Ted Dean Butler*, ____ F.2d ____ (9th Cir. 1974).

(c) There is no requirement, by the legal obligations of either the *office* or the *oath* of the District Attorney to use perjury, and indeed the same is forbidden by the office, the oath, the Constitution, and the decisions of this Honorable Court, the Highest Court of California, and the Federal Ninth Circuit governing the State of California and the Central District of California.

(d) the "public good" can hardly require that the prosecutor use perjury, and hence he need not fear a lawsuit because he "would be deterred" to "willingly execute his office with the decisiveness and the judgment required by the public good." (40 L.Ed.2d 90, 99).

In short, the avowed reasons for so-called official executive immunity can not be appropos of the forbidden acts of this State Prosecutor, an actual arm of the executive branch of government, and he should receive no more immunity than that immunity denied the executive branch in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974).

Chief Justice Burger, at 40 L.Ed.2d 90, 100, noted that

> "It can hardly be argued at this late date, that under no circumstances can the officers of state government be subject to liability under this statute. . ."

42 U.S.C. 1983 was meant

> "to give a remedy to parties deprived of Constitutional rights, privileges and immunities by an official's *abuse* of position." Thru the Civil Rights statutes, Congress intended to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. (40 L.Ed.2d 90, 100).

Under the instant allegations, much like those set forth in *Hilliard v. Williams*, 465 F.2d 1212 (6th Cir. 1972), it can not honestly be asserted that the knowing use of perjured testimony is a good-faith act of discretion, wherein honest "error" may sometimes arise, within the *legitimate* prosecutorial function, so as to insulate the act of the aberrant prosecutor from liability under 42 U.S.C. 1983. This conclusion follows from either an "executive" or "judicial" vantage point, whatever may be the contention as to the position occupied by the nation's prosecutors.

It must be clear that the defense of "good faith," and "probable cause" ala police officer suits under 42 U.S.C. 1983 is simply not here either in issue or appropriate. *Pierson v. Ray*, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967); (40 L.Ed.2d 90, 101, 102).

Unlike *Scheuer v. Rhodes*, supra, where this Court noted the possibility that swift decision making may be necessary to quell civil disorders, (40 L.Ed.2d 90, 102), there is no concomitant rapid necessity to act in the area of deciding whether or not to use perjured testimony. That decision is fully removed from the quandry a prosecutor may otherwise find himself in in his day-to-day professional life.

We need not further reiterate the analysis of *Scheuer v. Rhodes*, a unanimous decision of this Honorable Court. We do note in passing that this Court enunciated a direct linear relationship between the scope of permissible decision making, honest error and the scope of area of decisions that had to be made. This means the scope of error allowed the police on arrest in good faith might well be smaller than that scope allowed the Governor of Ohio and his Adjutant General in calling out the Ohio National Guard to quell an uprising, where rapid decision making appears necessary to preserve the peace.

But we also return to our undeviating thesis: There is neither a quick nor contemplative decision-making process in the area of the life of the prosecutor where he faces the "choice" of whether to use or not use perjury, or to correct the same when it occurs; that "choice" is removed from him as surely as the taking of the forbidden fruit in the Garden of Eden by Eve. District Attorney Pachtman, respondent herein, just as did Eve, and eventually Adam, willingly and with

malice aforethough, went ahead and failed to correct testimony he knew to be wilfully false. That is not a good-faith act of honest error, and these issues have been adjudicated already in *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Calif. 1969).

Paraphrasing from *Scheuer v. Rhodes*, 40 L.Ed.2d 90, 103,

> "Under the criteria developed by precedents of this Court, Sec. 1983 would be drained of meaning were we to hold that the acts of a (district attorney) has the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government . . ." ". . . If this extreme position could be deemed to be well taken, it is manifest that the feat of a (district attorney), and not the Constitution of the United States, would be the Supreme Law of the Land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers . . . to the (prosecutor) to be exercised by him, beyond control, upon his (subjective) assertion of necessity . . . When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

Scheuer v. Rhodes, 416 U.S. 232, 40 L.Ed.2d 90, 103 - 104.

Thus, it is evident that the suit against the instant prosecutor is not one subject to dismissal on the pleadings under several theories:

(1) In fact the prosecutor is as much a member of the executive branch and team as is the Governor.

(2) In the case at bar, he violated Constitutional rights guaranteed this petitioner by performing the non-discretional, non-good faith act of using perjured testimony in a state criminal proceedings, an act forbidden by all known judicial decisions.

(3) From its very nature, "good-faith error" can not be a defense under the asserted facts of this case.

(4) No duty of his office required rapid decision in an esoteric area where he rightly might be absolved of honest error of judgment and use of discretion.

(5) His act was not required by the "public good," and the judgment preceding that act was one forbidden to him to make or use discretion thereon.

We suggest that this Court must come to grips with the fundamental issue of whether a *prosecutor*, a member of the *executive branch*, should derive any pseudo-immunity stemming from the immunity accorded to the judiciary. We assert that *Scheuer v. Rhodes*, supra, commands that he should not, and "quasi-judicial" immunity is really here highly misplaced. It is an intellectual non-sequitur, and a concept that must be reanalyzed in light of the well-thought reasoning of *Scheuer v. Rhodes*.

V.

THIS HONORABLE COURT HAS RECENTLY GREATLY REVISED AND INCREASED THE SCOPE OF THE CAUSE OF ACTION UNDER 42 U.S.C. 1983 LAWSUITS BY PROVIDING FOR A CAUSE OF ACTION FOR COMMON LAW NEGLIGENCE, WHEN THE PERPETRATOR KNEW, OR REASONABLY SHOULD HAVE KNOWN THAT HIS ACT(S) WOULD CAUSE A DEPRIVATION OF CIVIL RIGHTS TO HIS VICTIM. *WOOD V. STRICKLAND*, ____ U.S. ____, 43 L.Ed.2d 214, 95 S.Ct. 992 (1975).

This Honorable Court has previously extended immunity on both unrestricted and restricted basis to recognized government groups. In *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) the members of the legislature were granted full immunity from Civil Liability for acts *done within the sphere of legislative action*. In *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), the commonlaw doctrine of absolute judicial immunity was found to survive assault under 42 U.S.C. 1983. In the area of the executive branch, however, immunity was not extended to police officers acting outside of a good-faith performance of their duties. *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (19 __). Similarly, the pinnacle of the executive branch, the state governorship, was held reachable in certain circumstances under 42 U.S.C. 1983 only last term, *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). In school administrative areas, clearly an extension of the executive arm, this Court continued to

embrace immunity from tort liability for all *good-faith*, non-malicious actions taken to fulfill official duties. In general, the good-faith performance of an act of *discretion* requiring "prompt action" shall be provided immunity from Civil Rights suits. Nonetheless, it is clear that a cause of action validly plead and validly alleged shall not be dismissed at the pleading stage for failure to state a cause of action. *Wood v. Strickland*, ____ U.S. ____, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975).

In general, an important, broad principle can be distilled from the *Wood v. Strickland* analysis:

> Immunity shall not be accorded if the perpetrators *knew* or *reasonably should have known* that the acts under assailment done within the sphere of "official responsibility" would violate the constitutional rights of the victim, *or* if the action was done with a malicious intention to cause a deprivation os [sic] such rights. A monetary sanction can and will be awarded where such acts were carried out with impermissible motivation, *or* with negligent disregard of the victim's rights.

It appears that thus this Honorable Court has enhanced and elevated the requisite standards, to embrace a cause of action under a theory of common law negligence imposing a *standard of care* upon the officials involved. It requires the official involved to be aware of the duties of his station in life. This would require the State Prosecutor *to be aware of*, as in the case sub judice, the leading mandates of this Honorable Court in the range of decisions set forth earlier in this brief commencing with *Mooney v. Holohan*, supra, and including *Napue v. Illinois*, supra.

It would require that state prosecutors not only overtly and knowingly refrain from proscribed *intentional* misbehavior, but would, in addition, impose

a minimal standard of learning and expertise on their functioning.

Such standards are welcome and surely encompass the prosecutor here involved, requiring him to be aware of the guidelines of his profession.

Although we do not feel we have to descend to the standards of common law negligence to state a cause of action, because we have a published decision establishing the *intentional acts*, we welcome the foregoing elevated thinking and advancements in the law of 42 U.S.C. 1983 liability. As recognized in the dissent in *Wood v. Strickland*, supra, *ignorance*, both of the law and requirements of the position held by the defendant, is explicitly equated with "actual malice." 95 S.Ct. at 1004.

It is significant to the case at bar that the *Wood v. Strickland* standards emanated from a factual situation of laymen acting in their "official capacity" as school board members. We suggest that much more cogent reasons then follow for extending the negligence standards to trained lawyers occupying the prosecutorial role who are presumed to be thus familiar with the decided cases and standards in their area of expertise. They, of course, must be charged with the requirements of knowledge of the Canons of Ethics and the Oath of Admission taken when they become members of the Bar. They simply can not escape these fundamental tenents of their role.

We thus urge that the prosecutor here involved, a member of the executive branch of government, shall not escape liability when he either negligently *or* knowingly uses perjury to achieve a criminal conviction. Such is a forbidden act under all recognized decisions of all recognized Courts.

It should be noted that U.S. District Judge Warren J. Ferguson, in granting relief under 28 U.S.C. 2254, recognized a potential basis for relief in the *negligent*, or *reckless* use of false testimony. 298 F.Supp. 795; Single Appendix, Pages 30-60, inclusive. While the District Court did not have to descend to negligence theories, it is clear that an equal deprivation of due process can flow from negligent behavior as from intentional behavior.

We can envision no clearer area of further foundational basis for 42 U.S.C. 1983 liability than extending a cause of action under a theory of negligence to the state prosecutor whose trial tactics are regulated by well-developed constitutional law decisions in the area of use of false testimony. Either the reckless use of false testimony or the knowing use of perjured testimony shall thus support relief under a 42 U.S.C. 1983 suit where, as here, all states impose rigid training and standards on members of the legal profession, and where they must be believed and required to be aware of these standards. *Wood v. Strickland*, ____ U.S. ____, 95 S.Ct. 992, 43 L.Ed.2d 214. (Appendix A-2, this brief.)

CONCLUSION

For each of the foregoing Issues, Questions, Arguments and Points and Authorities, liability against a prosecutor should lie in a 42 U.S.C. 1983 Federal Civil Rights lawsuit, under the circumstances where that prosecutor has wilfully suffered and allowed the knowing use of perjured testimony in a state criminal trial to achieve a criminal conviction; since these acts

are not good-faith, discretional acts within the *legitimate* prosecutorial function, the prosecutor should not enjoy "quasi-judicial" immunity.

At the very minimum, the suit in the instant case should be permitted in view of the grant of a Federal Writ of Habeas Corpus based in part on the same allegations of the instant Civil Rights complaint, said Writ being granted by the Honorable Warren J. Ferguson, United States District Judge, Central District of California under 28 U.S.C. 2254 and the provisions of *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). *Imbler v. Craven,* 298 F. Supp. 795 (C.D. Calif. 1969), affirmed by the United States Ninth Circuit, *Imbler v. California,* 424 F.2d 631 (9th Cir. 1970), cert. den., 400 U.S. 865, 91 S.Ct. 100, 27 L.Ed.2d 104.

Respectfully submitted,

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APPENDIX A-1

Lilly Mae Onie Lee Whitelaw HILLIARD, Plaintiff-Appellant,

v.

John L. WILLIAMS, Defendant-Appellee.

No. 71-1983.

United States Court of Appeals, Sixth Circuit.

June 28, 1972.

As Amended July 31, 1972.

Certiorari Denied Nov. 20, 1972. See 93 S.Ct. 461.

Damages action brought under the Civil Rights Act against district Attorney General who had prosecuted plaintiff in a criminal proceeding. The United States District Court for the Western District of Tennessee, Eastern Division, Harry W. Wellford, J., sustained a motion to dismiss for failure to state a claim upon which relief could be granted, and plaintiff appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff.

Reversed and remanded.

1. Courts ⇐406.5(4)

On appeal from dismissal of a civil rights action, averments of complaint must be treated as true by Court of Appeals and are to be viewed in light most favorable to complainant.

2. Federal Civil Procedure ⇐1773

Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to re-
lief.

3. District and Prosecuting Attorneys
⇐10

A prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided his acts are within the scope of his jurisdiction and authorized by law.

4. District and Prosecuting Attorneys
⇐10

A quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law cannot shelter himself from liability by the plea that he is acting under color of office.

5. District and Prosecuting Attorneys
⇐10

Doctrine of quasi-judicial immunity for a prosecuting attorney would not be extended to a complaint charging that district Attorney General deliberately suppressed at first murder trial of plaintiff, whose initial conviction was reversed and who was then acquitted at second trial, an FBI report establishing the innocence of plaintiff. 28 U.S.C.A. §§ 1292(b), 1343(3); 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc. rule 12(b)(6), 28 U.S.C.A.

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Before PHILLIPS, Chief Judge, EDWARDS, Circuit Judge, and McALLISTER, Senior Circuit Judge.

PHILLIPS, Chief Judge.

To what extent does a prosecuting attorney have civil immunity in a suit filed by a defendant whom he has prosecuted in a criminal proceeding? This recurring question is presented on the present appeal.

The defendant-appellee is the District Attorney General for the Twenty-sixth Judicial District of Tennessee. He was prosecuting attorney at a trial resulting in the conviction of plaintiff-appellant Hilliard for second degree murder. This conviction was reversed by the Tennessee Court of Criminal Appeals on April 15, 1971. At the second trial Mrs. Hilliard was acquitted. In the meantime she had served one year in prison.

The evidence upon which Mrs. Hilliard was convicted at her first trial was entirely circumstantial. A key issue was whether stains on the nylon jacket worn by her at the time of her arrest were blood stains, and if so, whether the stains were from human blood as contended by the prosecution or hog blood as contended by the defense.

In reversing the conviction, the Tennessee Court of Criminal Appeals said:

> "Of quite devastating impact tending to show guilt was the fact that the defendant had what appeared to be blood stains on her jacket. The State introduced proof of this, and then it was revealed that the jacket itself had been sent to the F.B.I. laboratory in Washington D. C. for chemical analysis and, although some three months had passed since the jacket had been taken from the defendant, it had not been returned for use at the trial; nor was there any information available to shed light on the vital issue of whether the blood was human as theorized by the State or hog as theorized by Mrs. Hilliard.
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> "Although, as aforesaid, no opportunity was allowed the trial court to correct any error that might have been involved in allowing the State's proof concerning the blood being on the jacket when it developed that the jacket itself was, by State action, unavailable, and thus we cannot consider the propriety of the court's rulings on the objections made during trial; the impact of this testimony does enter into our decision. The proof offered by the State relative to this blood was circumstantial as was all the other. But here there was an opportunity to make available to the jury direct

> proof, in the face of the defendant's testimony that the blood was that of a hog, that would have supported one theory and discredited the other. Either the blood was human or swine. It is had been established as human, this would have left little room for doubt that the defendant was not telling the truth in her explanation of how she got blood on her clothing. If it developed that the blood was from a hog, this would have proved conclusively that she was telling the truth, in this particular at least.
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> "Certainly the two hypotheses suggested by the proof of blood on the jacket—one tending strongly to suggest guilt, the other tending to support the theory of the defendant—are equally reasonable. In its present condition the evidence offered by the defendant buttressed by the presumption of innocence never overcome by sufficient proof preponderates against the verdict."

Following her acquittal at the second trial, Mrs. Hilliard filed the present civil action for damages against the District Attorney General. Jurisdiction is asserted both on the ground of diversity of citizenship and under the civil rights act, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3).[1]

The District Attorney General filed a motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P. for failure to state a claim on which relief can be granted. The District Court sustained this motion, holding that the District Attorney General is immune from civil liability. We reverse, holding that the District Court erred in ruling that the complaint does not state a claim on which relief can be granted.

This is an interlocutory appeal under 28 U.S.C. § 1292(b). The District Court certified that the order of dismissal involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. The District Court also directed the entry of final judgment as to the District Attorney General, making an express determination that there is no just reason for delay. Rule 54(b), Fed.R.Civ.P. This court granted leave to appeal.

[1, 2] Our reversal is based entirely upon the factual averments of the complaint, which are summarized hereinafter in this opinion. These averments must be treated as true for purposes of this appeal and are viewed in the light most favorable to Mrs. Hilliard. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972), L'Orange v. Medical Protective Society, 394 F.2d 57, 59 (6th Cir. 1968). "In appraising the sufficiency of this complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

The complaint avers that Mrs. Hilliard is a citizen of Indiana; on or about December 24, 1969, she arrived in Carroll County, Tennessee, to visit her maternal aunt, Vina Prince, and the aunt's husband, Ernie Prince; the purpose of her visit was to assert and settle her claim to a one-half interest in certain real estate inherited from her grandmother; Ernie Prince had operated the land for many years and had claimed ownership from time to time; on February 19, 1970, Ernie Prince was killed and Mrs. Hilliard was arrested and charged with his murder.

The complaint further states that at the time of her arrest Mrs. Hilliard was wearing a blue nylon jacket which the officers claimed was stained with the

1. The other defendant is the Resident Agent of the Tennessee Bureau of Investigation, who filed an answer in the District Court. He is not a party on this appeal.

blood of Ernie Prince; the victim was murdered by two vicious axe blows to the skull, and the body thereafter was dragged to the rear of the house and shot in the mouth with a shot gun. Mrs. Hilliard asserted that when she was arrested there was no blood on her jacket, but if there were any such stains it was hog blood from preparing raw meat.

The complaint asserts that circumstantial evidence pointed the finger of guilt to Vina Prince, who is insane. The opinion of the State Court of Criminal Appeals pointed out that Mrs. Prince was not available as a witness, due to her mental condition. The court commented:

> "It is regrettable that she was not available as a witness . . . Since there is no doubt that this woman was present before, during, and after the assault of the deceased, her potential as a witness is quite evident. She could have witnessed the crime or have committed the crime herself."

It is averred that the only probative material evidence against Mrs. Hilliard was the allegedly blood stained jacket and some allegedly blood stained curtains; that the jacket and curtains were sent to the FBI laboratory in Washington, D. C., for analysis; that the FBI report was negative as to human blood, or any blood, being on either the jacket or the curtains; that the District Attorney General saw the FBI report well in advance of the trial and was familiar with its contents; that neither the FBI report nor the jacket and curtains were made available to be introduced in evidence at the trial; that the contents of the FBI report were never divulged to Mrs. Hilliard or her attorney; instead, it was claimed by the prosecution that the jacket and curtains had been resubmitted to the FBI on April 28, 1970, at a time when the trial already had been set for May 15, 1970, too late for them to be returned in time for introduction in evidence; that the District Attorney General produced evidence before the jury to the effect that the spots on the jacket and curtains "looked like" or "appeared to be" blood stains, in spite of the FBI report that there were no blood stains; that the District Attorney General suppressed and concealed the positive proof that there was no blood on either the jacket or curtains; and that if the FBI report had been introduced into evidence, Mrs. Hilliard would have been acquitted at her first trial as she was at the second.

The complaint further contains these averments:

> "22. That in the preparation of the case, the Defendant Williams advised or suggested or implied by some means that the witness Defendant Clark and perhaps others, should not mention anything about the first report of March 28, 1970, and that the Defendant Clark and other witnesses followed his instructions and answered both direct examination questions and cross-examination questions evasively, deliberately misleadingly, with half truths and in instances falsely, to carry out the complete suppression of the report of negative blood analysis of the items.
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> "23. That the Defendant Williams to carry out his intention of concealing and suppressing the report, contrary to any interpretation of good practice, and knowing that the defense expected the production of the jacket and report of the examination thereof for human blood, the Complainant insisting that there was no blood or if blood then animal blood, not human, announced that the State was ready for trial well knowing he was not going to offer the jacket or curtains or the report, and that once the trial had commenced, the Complainant's defense counsel could not obtain the jacket or any report in time to use it for defense evidence in the trial, and thus suppressing and concealing the evidence which would acquit the Complainant.
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> "24. That the Defendant Williams when the Complainant's defense counsel demanded the production of the jacket, or a continuance until it could be produced, knowingly and deliberately advised the Court that through no fault of the State or prosecutors the jacket was not immediately available, as a witness had testified, when he knew or should have known by diligent inquiry that the same was in the T.B.I. office in Nashville, and would have required only two and one-half (2½) hours to be available, and he well knew that the jacket was deliberately sent off on such a late date that its return by trial date was impossible, and he knew of the materiality of the jacket and report and should have announced its unavailability before commencement of the trial, and by these actions suppressed and concealed the evidence of the jacket and report favorable to the Complainant.
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> "25. That the Defendant Williams knowingly procured and allowed witnesses such as the Defendant Donn Clark and perhaps others to mislead and deceive the Jury, Court, and criminal Defendant and her counsel, when he was aware of stronger evidence than that elicited from his witnesses, which was favorable to the criminal defendant, and failed and refused to reveal the favorable evidence and allowed the evidence he knew to be false to form the basis of the Complainant's conviction of murder in the second degree.
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> "26. That both Defendants continued to suppress and conceal the report from the complainant's defense counsel, after the trial was concluded, knowing that the same would constitute a basis for a new trial for the Complainant and only disclosed the report when compelled by the opinion of the Court of Criminal Appeals which required that they do so, then revealing the same for the first time the 20th day of April, 1971.
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> "27. That the Defendants and each of them, by the suppression and concealment, and by trickery, deceit, fraud, unethical practices and conduct for a public official, contrary to their oath of office and in violation of the Defendant's right to a fair trial and due process, were the direct and proximate cause of the Complainant being illegally and unlawfully confined in either the Carroll County Jail or the State Women's Prison in Nashville, and wrongfully deprived of her liberty and freedom, and further the direct and proximate cause of unbelievable mental pain and anguish as a result of being unlawfully and wrongfully imprisoned and branded forever as a convicted murderess, suffered day and night behind prison bars and of her earnings during the period of illegal confinement, which is not yet at an end, but which commenced May 12, 1970.
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> "28. That thereafter, beginning on the 12th day of May, 1971, the complainant was retried in the Circuit Court of Carroll County, Tennessee, on the charge of murder, the said retrial being concluded on May 13, 1971, by a jury verdict of not guilty.
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> "29. That the complainant and her counsel on that retrial had the use and benefit, knowledge, and probative evidentiary document and report dated March 26, 1970, from the F.B.I. Laboratory, to the effect that their scientific examination revealed no evidence of any blood, of any kind, human or animal, and in the said re-trial all material aspects of the proof were the same except as to the said report.
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> * * * * * *
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> "32. That the defendants individually, and jointly, by conspiring, combination, consort and agreement did conspire for the purpose of depriving either directly or indirectly, the complainant of the equal protection of the laws and of equal privileges and immunities under the laws; and under color of a state statute, ordinance, regulation, custom and usage of the State of Tennessee, caused the complainant to be subjected to the deprivation of her rights, provileges and immunities secured by the Constitu-

tion and laws of the United States, and while so doing were acting under color of state authority, and outside the scope of the jurisdiction of their respective offices, and without authority of law and that such actions were calculated or did, in fact, subject the complainant to a deprivation of her constitutional right to a fair trial and due process of law, and were the direct and proximate cause of the injuries, damages, wrongs and loss of liberty and freedom from May 13, 1970, to May 13, 1971, and as set out above."

[3] It is well settled that a prosecuting attorney, when acting in his official capacity, is immune from suit for damages, provided that his acts are within the scope of his jurisdiction and authorized by law. Peek v. Mitchell, 419 F.2d 575, 578 (6th Cir. 1970); Hurlburt v. Graham, 323 F.2d 723, 725 (6th Cir. 1963); Kenney v. Fox, 232 F.2d 288, 290 (6th Cir. 1956). See also Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970).

[4] However, the immunity of a prosecuting attorney from civil liability is not absolute:

> "[A] quasi-judicial officer, such as a prosecuting attorney, who acts outside the scope of his jurisdiction and without authorization of law, cannot shelter himself from liability by the plea that he is acting under color of office." Lewis v. Brautigam, 227 F.2d 124, 129 (5th Cir. 1955).

In McCray v. State of Maryland, 456 F.2d 1, 3 (4th Cir. 1972) the court said:

> "The immunity of quasi-judicial officers such as prosecuting attorneys and parole board members derives, not from their formal association with the judicial process, but from the fact that they exercise a discretion similar to that exercised by judges. Like judges, they require the insulation of absolute immunity to assure the courageous exercise of their discretionary duties. Where an official is not called upon to exercise judicial or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role in the judicial system." (Footnotes omitted)

To like effect see: Madison v. Purdy, 410 F.2d 99, 101 (5th Cir. 1969); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965). Cf. Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972); Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970); Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932).

See also the order of the Supreme Court denying application for mandamus and certiorari in Garrison v. Brown, 405 U.S. 985, 92 S.Ct. 1253, 31 L.Ed.2d 469 (1972), involving an action for civil damages against District Attorney Jim Garrison of New Orleans for his prosecution of Clay Shaw on the charge of conspiring to assassinate President John F. Kennedy.

The Code of Professional Responsibility adopted by the American Bar Association contains the following provisions with respect to the duties of a public prosecutor:

> "EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused."
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> "DR 7-103 Performing the Duty of Public Prosecutor or Other Government Lawyer.
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> "(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.
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> "(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."

[5] We hold that factual averments of the complaint as summarized above, considered in a light most favorable to plaintiff, charge the District Attorney General with acts which were outside his quasi-judicial capacity and beyond the scope of "duties constituting an integral part of the judicial process." We are not willing to extend the doctrine of quasi-judicial immunity to a complaint charging deliberate suppression of an FBI laboratory report establishing the innocence of the defendant.

Nothing in this opinion is intended to express any view as to the merits of the case. We do no more than hold that the District Judge erred in dismissing for failure to state a claim on which relief can be granted.

Reversed and remanded.

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APPENDIX A-2

WOOD v. STRICKLAND

Cite as 95 S.Ct. 992 (1975)

These considerations have undoubtedly played a prime role in the development by state courts of a qualified immunity protecting school officials from liability for damages in lawsuits claiming improper suspensions or expulsions.[12] But at the same time, the judgment implicit in this common-law development is that absolute immunity would not be justified since it would not sufficiently increase the ability of school officials to exercise their discretion in a forthright manner to warrant the absence of a remedy for students subjected to intentional or otherwise inexcusable deprivations.

[4] Tenney v. Brandhove, Pierson v. Ray, and Scheuer v. Rhodes drew upon a very similar background and were animated by a very similar judgment in

12. "[School directors] are authorized, and it is their duty to adopt reasonable rules for the government and management of the school, and it would deter responsible and suitable men from accepting the position, if held liable for damages to a pupil expelled under a rule adopted by them, under the impression that the welfare of the school demanded it, if the courts should deem it improper." Dritt v. Snodgrass, *supra*, 66 Mo. 286, 293 (1877).

construing § 1983. Absent legislative guidance, we now rely on those same sources in determining whether and to what extent school officials are immune from damage suits under § 1983. We think there must be a degree of immunity if the work of the schools is to go forward; and, however worded, the immunity must be such that public school officials understand that action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity.

> "Public officials, whether Governors, Mayors or police, legislators or judges, who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not

to decide or act at all." Scheuer v. Rhodes, *supra*, 416 U.S. at 241–242, 94 S.Ct., at 1689 (footnote omitted).

[5–7] The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official must himself be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his

charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of § 1983. Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." Pierson v. Ray, *supra*, 386 U.S., at 557, 87 S.Ct., at 1219. A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.